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ABSTRACT

The legal problems with which a religious higher education institution must deal if it receives state and/or federal financial assistance and requires attendance at its religious exercises are discussed. Selected state and federal court cases are reviewed and analyzed, including the United States cases of Tilton v. Richardson (1971), Lemon v. Kurtzman (1971), Hunt v. McNair (1973), and Roemer v. Board of Public Works (1976). Discussion of the three-fold judicial test of "secular legislative purpose," "primary effect," and "excessive entanglement" set forth by these Supreme Court and other court cases is followed by suggestions of practical guidelines which religious higher educational institutions can use to ascertain whether their institutional policies with regard to either receipt of state and/or federal financial assistance or requirements for attendance at religious exercises need to be revised. These kinds of institutions are reminded that courts generally do not require cessation per se of compulsory religious activities. On the other hand, receipt of government funds could mean that institutional recipients could be forced to choose between receipt of government financial aid or an institutional policy supportive of compulsory attendance at religious activities. (Author/MSE)

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THE CONSTITUTIONALITY OF COMPULSORY ATTENDANCE AT RELIGIOUS EXERCISES IN RELIGIOUS INSTITUTIONS OF HIGHER EDUCATION WHICH ARE THE RECIPIENTS OF STATE AND FEDERAL FINANCIAL ASSISTANCE

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ABSTRACT

This paper deals with the legal problems with which a religious higher education institution must deal if it receives state and/or federal financial assistance and requires attendance at its religious exercises. The paper reviews and analyzes selected state and federal court cases including the United States Supreme Court cases of Tilton v. Richardson (1971), Lemon v. Kurtzman (1971), Hunt v. McNair (1973), and Roemer v. Board of Public Works (1976).

Discussion of the three-fold judicial test of secular legislative purpose, primary effect, and excessive entanglement set forth by these Supreme Court and other court cases is followed by suggestions of practical guidelines which religious higher educational institutions can use to ascertain whether or not their institutional policies with regard to either receipt of state and/or federal financial assistance or requirements for attendance at religious exercises need to be revised.

These kinds of institutions are reminded that courts generally do not require cessation per se of compulsory religious activities. On the other hand, receipt of government funds could mean that institutional recipients could be forced to choose between receipt of government financial aid or an institutional policy supportive of compulsory attendance at religious activities.

I. Introduction

> Each student will(emphasis added) become a member of _____ Church upon moving to the College. Chapel services are conducted three times each week and attendance is required. Christian service assignments are made (and) each student is required to complete one Christian service assignment each semester that he is enrolled at _____College.[1]

These and similar statements fill the college catalogs of numerous religious colleges throughout the United States. In the above particular situation, the college has been approved by the State Council of Higher Education and is a recognized candidate for accreditation by a regional accrediting agency. And such college is like others similarly situated in that its students are eligible for Basic Educational Opportunity Grants, Supplemental Educational Opportunity Grants, College Work-Study employment monies, National Direct Student Loans, and Guaranteed Student Loans. Most of these programs are fully-funded by the Federal government. Further, its students are eligible to receive Social Security and Veteran's benefits. Finally, such students are also eligible to receive financial assistance, including grants and loans, from the state wherein the college is located.

Does this receipt of government dollars by the above-referenced college and others similar thereto, violate the Establishment Clause of the First Amendment to the United States Constitution, particularly because of certain prescribed religious activities required of all students therein? The issue to be analyzed in this paper, narrowly drawn, is to determine the legality of compulsory attendance at religious exercises in religious colleges and universities which are recipients of Federal and State financial assistance.

II. The Litigation Framework

In the advanced stages of the twentieth century welfare state, it is becoming increasingly more difficult for religious colleges and universities of higher education to survive untroubled by the financial programs of both State and Federal government.[2] In a time when institutions need money to remove the skeletons from their fiscal closets and when government is synonymous with money, the temptation to accept increased government funding becomes very difficult to resist. It bespeaks the gravity of the situation when a former Secretary of Health, Education, and Welfare felt constrained to warn colleges and universities, including private religious institutions, of the dangers of over-dependence on Federal financial assistance:

> In higher education, some institutions have become dangerously dependent, in my judgment, for their support on federal programs. With those valuable federal dollars (comes) the threat of dependency, red tape, burdensome requirements, and unintended side effects.[3]

All institutions receive some type of government aid, whether it comes directly from materials grants and loans, benefits under the G.I. Bill, Social Security, the varied forms of student aid, or indirectly in the various forms of tax advantages/benefits.[4]

The newest but most rapidly increasing forms of government aid are the student loan, grant, employment, and scholarship programs. The Federal government supplies a major portion of these funds by way of Supplemental Educational Opportunity Grants, National Direct Student Loans, Basic Opportunity Grants, and through College Work-Study Programs.[5] And a large number of students each year channel millions of additional dollars to religious as well as other private and public institutions from state grant/scholarship and guaranteed student loan programs.[6] Further monies are made available to religious colleges for capital construction projects under Title I of the Federal Higher Education Facilities Act of 1963[7] as well as under similar State programs.

The First Amendment to the United States Constitution reads in part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .[8] (emphasis added). This Amendment, then, provides the constitutional framework wherein Congress is precluded from establishing religion. State governments are likewise affected by the First Amendment because through the Fourteenth Amendment, such was made applicable to the states and gave rise to what has become known as "state action".[9] The Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship". The Free Exercise clause safeguards the free exercise of the chosen form of religion. The test for both is that of governmental neutrality.[10] In other words, the government cannot either advance religion or be hostile thereto.

In analyzing the issue at hand, given the fact that both the Federal constitution and state constitutions speak implicitly and explicitly to Establishment and Free Exercise, it is helpful to note that state and Federal legislation must pass muster under both a respective state constitutional analysis and a Federal constitutional analysis. The constitution of Washington state, for example, explicitly takes a more strict view with regard to Establishment than that required by the Federal constitution.[11] State statutes, then, which on their face may pass federal constitutional standards are nevertheless subject to state constitutional requirements. In this regard, what tests have been used to determine whether the Establishment Clause has been violated?

In 1971, the United States Supreme Court, in the case of Lemon

v. Kurtzman[12] identified three tests for determining the constitutionality of state statutes dealing with aid to private schools. First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one which neither advances nor inhibits religion.[13] Third, it must not foster excessive governmental entanglement with religion.[14] The statute must meet all three tests in order to be constitutional. If the statute is not constitutional, then the various state aid programs to students would no longer be available to religious institutions of higher learning. These three tests have become the sine qua non of constitutional analysis in cases dealing with aid to religious schools. And this constitutional thread (the three-fold test) is ablaze with color throughout the cases dealing with government aid to "religious" educational institutions.

Even though a statute may survive the rigor of both state and Federal constitutional analysis, the character of the given institution may nevertheless be dispositive of the issue. If a college, for example, is found to be a "religious" college offering a sectarian education to its students, then courts will generally conclude that if state and/or Federal funds are received by this kind of an institution, such would be in violation of the federal Establishment Clause. The point to be emphasized here is that the institution would not have to cease its required "religious" exercises. Rather, it would "only" have to forgo the particular aid program. It could not pursue both the "religion" as well as the "aid" option. Generally, courts will review the programs of colleges on a program by program basis in order to render their decisions as to whether an institution is an eligible aid recipient. Two recent court cases, one involving a Federal statute and

one involving a state statute, illustrate this process. The cases are Tilton v. Richardson[15] and Americans United for Separation of Church and State v. Bubb.[16]

Tilton v. Richardson was a 1971 decision of the United States Supreme Court dealing specifically with the constitutionality of the Higher Education Facilities Act[17] which provided funding for capital construction on private college campuses. The Tilton suit was filed by fifteen individuals who claimed the common bond of being Federal taxpayers.[18] Their constitutional attack was limited to Title I of the Higher Education Facilities Act, which authorized the award of Federal capital construction grants to public and private colleges. They challenged the constitutionality of the act insofar as it gave monies to sectarian schools . . . organized for and engaged in the propagation and promotion of the doctrines, teachings, and practices of a particular religion. In this case the religion was the Catholic religion and the four colleges and universities involved were: Fairfield University, Albertus Magnus College, Sacred Heart University, and Annhurst College.[19]

A brief summary of what the Court held is significant. By a vote of 5 to 4 and with the majority opinion written by Chief Justice Burger, the Court concluded that the Facilities Act was constitutional (with one exception). He noted further that all four defendant colleges were eligible to receive Federal funding under the program.

In analyzing the constitionality of the Act, Burger used the three-fold test already identified in Lemon,[20] that is, secular legislative purpose, primary effect, and excessive entanglement. He answered all of those tests in the negative, that is to say, he found a secular legislative

purpose; he found that the primary effect of the legislation was not to foster or inhibit religion; and he found that there was not excessive governmental entanglement. Burger also observed that "college students are less impressionable and susceptible to religious indoctrination" than parochial school pupils, concluding that "the skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations"[21] in allocating public funds by a church-related college.

Wilson's comments on Tilton are very incisive:

> It is instructive to list the evidence cited by Burger to support his conclusion that 'religious indoctrination is not a substantial purpose or activity' of the four defendant colleges. He noted that all four schools 'are governed by Catholic religious organizations' and have faculties and student bodies that are predominately Catholic in their religious composition. However, 'non-Catholics' were admitted as students and given faculty appointments at the four colleges. None of these institutions required its students to attend religious services (emphasis added).
>
> The Chief Justice also discussed how religion was taught at the defendant colleges. He noted that 'all four schools require their students to take theology courses.' However, he also stressed that 'the parties stipulated that these (theology) courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious values and are not limited to courses about the Roman Catholic religion.' He also pointed out that required theology courses at two of the defendant schools were taught by rabbis and that all of the schools 'introduced evidence that they made no attempt to indoctrinate students or to proselytize.' That evidence acquired extra force since 'these four schools subscribe to a well-established set of principles of academic freedom, and nothing in the record shows that these principles are not in fact followed.'
>
> In light of that evidence, the Chief Justice found that the defendant colleges were 'institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.'[22] Because the schools were of that character, there was less likelihood that that religion would permeate secular education, less risk that government funds would support religious activities, and less

> need for intensive government surveillance that could produce prohibited entanglements.[23]

In sum, Burger seemed to infer, as he looked at the totality of given institutional programs, religious or otherwise, that the educational function of the church-related colleges was not distorted because of the institutions' religious commitment.[24]

In the Bubb case, the Kansas legislature, as a way to save taxpayer dollars in terms of constructing "bigger" and "more" facilities at state universities, devised a plan to provide students attending private, independent colleges financial assistance in the form of tuition grants. Specifically, the grants went to the private college students with warrants for the total dollars delivered to qualifying institutions.[25]

The United States District Court (D.Kan.1974) without a great deal of difficulty and using the three-fold test used previously in Lemon and Tilton found that the statute authorizing the grants was constitutional. Interestingly, however, it also found that five colleges were ineligible to receive funds because of some impermissible constitutional defects, namely religious practices. The Court found that St. Johns College, by giving preference to students of its supporting denomination, imposed religious restrictions on the admission of students. This was an impermissible constitutional defect. It found that at Hesston College, Tabor College, and Sterling College, all required some form of religious participation by their students. At Sterling, students were expected to attend services twice weekly and were subject to dismissal for excessive absences. At Tabor, students and faculty met for chapel services three times per week. At Hesston College, attendance at chapels was voluntary, but even so, absences therefrom had the potential to serve as a basis for discontinuation as a student[26] (implicit coercion). At Bethel College,

oral examinations were required of all seniors over two books, one of which was always from the Bible. The Court found that this exercise inserted sectarian influence into the educational program and concluded that Bethel students were precluded from participating in the Kansas tuition grant program.[27]

To recapitulate, the Bubb court gave three reasons as to why the above colleges could not be beneficaries under the Kansas program. First, that college (here, St. Johns) which reserved the right to give preference in enrollment to applicants of a certain faith and further required applicants to submit a pastor's evaluation was not entitled to aid under the statute. Second, aid to those colleges which required some form of student religious participation (here, attendance at chapel) was impermissible. Third, that religious mission served by Bethel College, which implicitly forced students to verbally express a belief in Christianity was too pervasive to permit its participation in the tuition grant program.

As did the United States Supreme Court in Tilton, the United States District Court in Bubb used the three tests as set forth in Lemon. In other words, the Kansas court found that the challenged state statute did have a secular legislative purpose,[28] that the statute did not have as its primary effect either fostering or inhibiting religion,[29] and that there was not excessive governmental entanglement.[30] Significantly, then, the thread used to weave the fabric in Lemon, and Tilton continued in Bubb. Judicial review of these kinds of issues, furthermore, has not been limited to Tilton and Bubb.

Another state case, California Education Facilities Authority v. Priest,[31] decided by the Supreme Court of California, upheld the constitution-

ality of capital construction monies to be used for private colleges. Here, a State act was enacted to provide aid for sectarian education. A writ of mandamus was sought by a private college to compel distribution and issuance of the appropriate revenue bonds. In concluding that the writ should issue, the Court concluded that the Act which authorized issuance of revenue bonds and the use of proceeds therefrom to rehabilitate or construct educational facilities at private colleges and universities was not violative of either the Establishment Clause of the First Amendment or California constitutional provisions prohibiting state aid for sectarian purposes. As in Tilton, Lemon, and Bubb, the Court used the heretofore discussed three-pronged analysis to uphold the California statute in question.

Two additional United States Supreme Court decisions on the constitutionality of government aid to religious higher education have been decided since Tilton. The first is Hunt v. McNair[32] and the second is Roemer v. Board of Public Works.[33]

In Hunt, the South Carolina Educational Facilities Authority Act established an Educational Facilities Authority to assist (through issuance of revenue bonds) institutions of higher education to construct and finance facilities such as buildings, facilities, and site preparation. Facilities which involved sectarian instruction or religious worship were not eligible for such funding. Inasmuch as the program was intended to be totally self-supporting, neither the State's taxing power nor the Authority itself were legally obligated to pay principal of or interest on the bonds.

One of the beneficiaries of the Act, the Baptist College at Charleston, had received preliminary approval for the receipt of funds under

the arrangements specified under the Act. The College wanted to use the funds to refinance capital improvements as well as to complete a campus dining hall. The State Authority had issued, and the College had agreed to observe "sectarian and worship" provisions of the Act. A taxpayer in the State of South Carolina, however, challenged the legality of the State's action, claiming that since the Baptist College at Charleston was approved for funds, such Act violated the Establishment Clause of The First Amendment, and as such was unconstitutional. The State trial court's decision, that the Act was constitutional, was affirmed by the South Carolina Supreme Court.

In affirming the decision of the South Carolina Supreme Court, the Supreme Court of the United States again relied on its three-fold test as set forth in Lemon. It found that the primary purpose of the Act was secular; that the statute did not have the primary effect of advancing or inhibiting religion; and that the statute did not foster excessive governmental entanglement with religion. Here, no evidence was presented which showed a pervasive involvement of a controlling religious denomination, an otherwise assumed fatal defect. As the Court observed:

> So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.[34]

The rule from Hunt, and instructive for its progeny is:

> (T)hat no state aid at all should go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones and that if secular activities can be separated out, they alone may be funded.[35]

In the Roemer case, the State of Maryland enacted, in 1971, a statute which authorized the payment of State funds to any private institution of higher education within such State which met certain

prescribed criteria and which did not award "only seminarian or theological degrees". The Act was further amended in 1972 (in response to Tilton) where aid so received by such private institutions could not be used to finance sectarian programs. The form of the aid, a one-time annual subsidy, was paid directly to the individual college based on the number of students enrolled therein. In sum, the aid was paid to the qualifying college for the benefit of the students and was not direct aid to the students. To be eligible to receive such aid, the primary administrator of the program, the Maryland Council for Higher Education, had to certify the eligibility for each institution of higher education. In 1971, $1.7 million was dispursed to seventeen private colleges in Maryland.

Four Maryland taxpayers challenged the constitutionality of the Maryland program claiming it violated the First Amendment's Establishment Clause. They claimed further that four Roman Catholic colleges, College of Notre Dame, Mount Saint Mary's College, Saint Joseph College, and Loyala, were ineligible to receive aid under the Act because of their "pervasively sectarian" nature.

In Roemer, the United States Supreme Court upheld the constitutionality of the Maryland statutory program. In so doing, it reviewed in depth not only the cases on point which had preceded Roemer but also noted again that unique balance which must be maintained between the Establishment and Free Exercise Clauses:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions and other activities, but a hermetic separation of the two is an impossibility it has never required.[36]
>
> Neutrality is what is required. The state must confine it-

> self to secular objectives, and neither advance nor impede religious activity.[37]

To the argument that the receipt of State funds permitted the sectarian institution to free up its own funds for religious purposes, the Court offered this rejoinder:

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, the church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.[38]

The Court again used its three-fold test to analyze the facts of the given case: The statute must have a secular legislative purpose; its primary or principal effect must not either advance nor inhibit religion; and the statute must not excessively entangle the government in religion. This third part of the test required additional judicial analysis of the character and purposes of the benefited institutions; the nature of the aid provided; and the resulting relationship between the State and the religious authority.[39]

Applying these guidelines to the facts in Roemer, the Court observed that even though the Catholic church was represented on governing boards; even though Catholic chaplains were employed and religious exercises held on campuses (attendance was not required); even though mandatory religion or theology courses were taught; even though prayer was offered at the beginning of some classes; and even though the great majority of students were Roman Catholic; nevertheless, the Court found that the colleges involved were not "pervasively sectarian" in that they could separate their secular and sectarian functions. As Justice Blackmun warned, however, the Court would not tolerate a plan of aid which supported

a pervasively religious program:

> The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.[40]

At the United States Supreme Court level and in the three cases which have decided and herein referred to, Tilton (1971), Hunt (1973), and Roemer (1976), such Court has consistently used the three-fold test to determine not only the legality of a given statute but also to determine whether or not a given college can be a recipient of a particular form of governmental aid. Again, for review purposes, Tilton dealt with Federal aid for capital construction at private religious colleges. Hunt dealt with a type of State aid (non-student aid) which could be used for capital projects by private religious colleges. And Roemer dealt with State grants (again, non-student aid) which was given directly to the private religious colleges to be used for purposes deemed appropriate. In both Roemer and Hunt, however, the given State programs provided strict guidelines limiting state dollar use to non-sectarian projects and/or programs.

What guidelines, if any, can be drawn from these cases which will be helpful in resolving the problem advanced for study in this paper? The National Commission on United Methodist Higher Education has summarized them nicely:

> First, non-categorical or institutional aid is in and of itself constitutional. Second, certain institutions are ineligible for aid because the sectarian and secular functions cannot be separated. Third, Justice Balckmun's language (in Roemer) hints that whether the aid goes to the student or the institution may not be as important as how the funds are used, i.e., for identified non-sectarian purposes. Fourth, for primary effect and entanglement analyses, the central point of controversy . . . relates to the character of the institution. Fifth, the Supreme Court will place heavy reliance on the trial courts' assessment of the religious character of an institution.[41]

A brief review of three post-Roemer Federal District Court decisions are instructive for determining how courts have been construing the Roemer decision. In Lendal v. Cook (E.D. Ark. 1977),[42] State aid was made available directly to the student and such aid could be used at either private or public colleges or universities. In upholding the legality of the Arkansas program in this case, the Court basically concluded in part that as long as institutions could separate their sectarian from their non-sectarian functions, students attending such institutions could participate in the State's program. It's significant to note that the form of delivery (direct aid to the students) did not appear to affect the Court's analysis of the program.

A similar decision was reached in Smith v. Bd. of Governors of the University of N.C. (W.D.N.C. 1977).[43] The facts were somewhat complicated here as several different kinds of designated monies - institutional as well as student - were involved. The Court found first that the institutions challenged (Belmont Abbey College and Pfeiffer College) were not "so pervasively religious that their secular activities cannot be separated from their religious ones." Second, it found that the student, not the college, was the primary beneficary of the aid: "The Scholarship and tuition grants with which we are concerned primarily benefit the eligible student and their families."[44] Accordingly, inasmuch as the legislation did restrict expenditures to the secular functions of the colleges' sub justice, the Court had little difficulty in finding the various funding schemes to be constitutionality adequate.

The third case, Americans United for Separation of Church and State v. Blanton (M.D. Tenn. 1977),[45] has had a prolonged legal history. Initially Americans United for Separation of Church and State v. Dunn,[46] The Court

found for Americans United in holding that a Tennessee aid program was being administered unconstitutionally because there was no State restriction limiting funds to non-sectarian uses on private religious campuses. The case was accepted for appeal by the United States Supreme Court along with Roemer but was remanded to the District Court because the Tennessee legislature had subsequently changed the contested statute so as to include a sectarian use proscription. Ultimately, the entire legislative program was changed in favor of a new one which was designed to directly aid the student, not the institution. Since sectarian use proscriptions were tied to institutional aid programs and since by definition the new program was not an institutional aid program, such a prohibition was not included in the new legislation.

In upholding the constitutionality of this new program, the Federal District Court did so for a variety of reasons. First, it noted that the program was designed to benefit students attending any kind of institution, whether public or private, secular or sectarian. Second, it noted that benefits under the program did not accrue predominatly to one religious group. And third, the Court anologized the challenged program to that of the G.I. Bill. It agreed that religious colleges or churches (as in the case of the G.I. Bill) might benefit and observed:

> The Tennessee General Assembly sought to provide needy students with the opportunity to attend the higher education institution of their choice, be it public, private, sectarian, or non-sectarian. (T)he Court finds that the program, on its face and in its application, does not offend the values protected by the Establishment Clause.[47]

III. Institutional Analysis and Application

With this limited review of selected case law on the matter, the question to be analyzed in this study will be discussed: Given the range of state and Federal financial assistance programs, can a college which is a recipient of such aid compel attendance at its religious activities?

It appears from the analysis of the preceding court cases and with the possible exception of the Tennessee case, that even though:

> (C)hurch-related colleges can continue to provide opportunities for religious worship on (their) campuses without jeopardizing their eligibility for public funds, what they probably cannot do is compel attendance at religious services.48

From Tilton one does not know if required attendance at religious services by itself would have been sufficient to disqualify the institutions involved from Federal assistance because that narrow issue was not litigated. The "non-required attendance" argument was used, however, to substantiate the position that religious indoctrination was not a substantial purpose or activity. Further, "compulsory attendance" requirements were not litigated in either Hunt or Roemer although again, the Court noted in both that none of the institutions involved required compulsory attendance at religious exercises. The Bubb case, although involving state aid, does provide good authority for the proposition that compulsory religious attendance by itself is sufficient to disqualify religious colleges from participation in state grant programs, for at Sterling College, Tabor College, and Hesston College, compulsory "chapel" attendance was the sole fatal defect.

It is suggested that institutions which receive either State or Federal financial assistance could use a two-fold analysis which could be of some help in determining institutional policy in the area of compulsory attendance at religious exercises.

In religious higher education, there are at least three kinds of solvency. One kind of solvency is fiscal solvency, or the solvency which results from balanced budgets. A second kind of solvency is educational solvency which is used to mean that an educational program must have a substantial substantive component before it can be

called an institution of higher education. The third kind of solvency, and the first part of the institutional analysis suggested above is the concept of religious solvency. What is it that makes a religious college religiously solvent? Is it adherence to a doctrinal or denominational creed? Student Bible studies? Prayer before classes? Required attendance at religious services? Required theology courses? Control by a religious denomination? Until this question is answered, one cannot proceed to the second part of the analysis. For until religious colleges know what makes them religiously solvent, discussing required attendance at religious exercises may be irrelevant, particularly so if a college should decide that having required attendance at religious services should not be part of its religious solvency equation. The answer to the first inquiry leads to a second: Is compulsory attendance at religious exercises an essential part of an institution's religious solvency equation? If the question is answered negatively, one need go no further in the analysis, for such required religious exercises could be termed "voluntary" and the constitutional problem would be mooted. On the other hand, if an institution decides that it wants to continue its policy of required religious attendance, can such be legally continued along with the receipt of government aid?

There appear to be at least three options. First, the religious college could forgo all state and Federal financial assistance, thereby removing itself from possible Establishment Clause limitations. The potential problem with this choice is that it assumes a static legal climate. Law, however, is not static; it's dynamic. And a line drawn at X today could very easily be drawn at Y tomorrow. Here, a court might well decide to draw the line not at direct Federal/state assistance but at indirect Federal/state assistance. From a theoretical legal standpoint,

there is nothing which would preclude a court from concluding that because religious colleges do not generally pay corporate income taxes or because college donors receive deductions for gifts given to religious colleges, that such actions essentially amount to some kind of state and Federal financial assistance, albeit indirect assistance. Given such contingency, the religious college, then, which terminated its complicity with state and Federal direct financial aid programs would not be in any better legal shape. Forfeiture of state and Federal aid, for the long run, does not appear to be a "safe" course of action, if there is such a thing. A second option is to do nothing, that is, continue to require attendance at religious exercises. Litigation may or may not develop. This is a kind of "wait and see" position.

A third option is to redesign the total thrust of required religious programs so that such become an intergrated part of the total educational program and mission of the religious college. For many such colleges, required religious exercises such as chapel include convocations and assemblies. In sum, already such sessions are more than liturgical religious exercises. Is having Senator Mark Hatfield discuss his deeply "religious" view of politics and requiring attendance thereat an exercise in academic instruction or an act of religious worship? The same could also be said of Representative John Anderson and Minnesota governor Al Quie. If current religious exercises (compulsory) were restructured and revamped so that such would become an integral part of the total educational program of the religious college, such programs would probably withstand more readily the rigor of judicial analysis and scrutiny. The legal question would then conceivably be one of academic freedom rather than liturgical religious worship, and as such would require, possibly, a different legal analysis.

IV. Conclusions

In the Bubb case, discussed herein, Chief Judge Brown wrote a concurring opinion which gives some support to the third option suggested above:

> Except for this action by Bethel, I find no more sectarian adherence than a requirement by a college that in order to obtain a degree the student must have sufficient understanding and pass a course in English or a foreign language as a requirement of a degree . . . . It is time to paint with a broad brush and hold that a tuition grant to permit study at a religiously oriented college is not (emphasis added) fostering religion. It is merely giving a grown man or woman the right to study secular and/or sectarian ideas as the individual sees fit. Only by such a policy will we have both academic and religious freedom.[49]

Many religious colleges have been guilty of using rhetoric in their "rationale" for required attendance at religious exercises without backing such with institutional commitments. Many such colleges will argue the merits of required participation in required religious exercises and emphasize the importance of such to institutional mission. But many such colleges do not have a budget for such comparable to a similar program in an academic setting. It is said that such exercise, whatever it may be called, is important, but many students are given "wholesale" exemptions if there are significant conflicts, and many part-time degree students are as a class entirely exempt from the requirement. By their catalogs, such practices are arguably important, but by their practices, religious colleges appear to make such claims have a hollow ring.

Charles Wilson has offered a perspective to which every private religious college particularly those which face the choice between the pursuit of institutional mission or governmental aid, must respond:

> (A) lawyer can explain the price that might have to be paid for public aid. Only a court with the power of final judgment can determine what price must be paid. And only the college itself can determine whether the potential or actual price is too high.[50]

FOOTNOTES

1. _____ Colleges, Catalogue, 1978-79, pp.34-37. See also, Radcliffe, "The Coming First Amendment Challenge to Higher Education". Memorandum,House Committee on Education and Labor, October 5, 1975, pp.1,2. Radcliffe argues that those colleges infused with a religious mission stand to lose the most from First Amendment litigation: "(T)here are colleges, such as . . . members of the Christian College Consortium in which the sense of religious mission infuses the total program of the institution. This type of institution is threatened most by the impending cases."

2. See generally, Oaks, "A Private University Looks at Government Regulation", 4 J. Coll & U.L. 1 (1977). See also, O'Neil, "God and Government at Yale: The Limits of Federal Regulation of Higher Education", 44 U.Cin. L. Rev. 525 (1975).

3. Higher Education Daily, August 22, 1978, p.3. See also, Fitt, "The Buckley Amendment: Understanding It, Living with It", The College Board Review, Summer, 1975, No. 96, p.4: "Education is now so dependent on public funding that we no longer have real choices in terms of whether to accept or reject those funds; and so, (we) either comply or commit institutional suicide".

4. See generally, Symposium, "Federal Taxation and Charitable Organizations", 39 L. & Contemp. Prob. 1 (1975) and Symposium, "Federal Tax Issues confronting Institutions of Higher Education", 3 J. Coll. & U.L. 1 (1976). See also, Bob Jones University v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), aff'd mem., 592 F.2d 514 (4th Cir. 1975).

5. 20 U.S.C., 1070a (d), 1078 (e), and 1088b.

6. Endangered Service: Independent Colleges, Public Policy and the First Amendment, National Commission on United Methodist Higher Education, Nashville, 1976, Appendix Table 13.

7. 20 U.S.C., secs 701-758.

8. U.S.C.A. Const. Amend. One.

9. See also, G. Gunther and N. Dowling, Constitutional Law (Mineola, N.Y.: The Foundation Press, 1970). pp.454-491. See generally, R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge: Harvard University Press, 1977).

10. J. Peltason, Understanding the Constitution (Hinsdale, Ill.: Dryden Press, 1976), pp.125-129. See also, R. Miller and R. Flowers, Toward Benevolent Neutrality: Church, State, and the Supreme Court (Waco: Baylor University Press, 1977).

11. Weiss v. Bruno, 82 Wash.2d 199, 509 P. 2d 973 (Sup. Ct. 1973).

12. 403 U.S. 602 (1971).

13. 403 U.S. at 613. See also, Board of Education v. Allen, 392 U.S. 236, 243 (1968) for further discussion of this particular part of the three-part test.

14. 403 U.S. at 613. See also, Walz v. Tax Commission, 397 U.S. 664, 674 (1970) for further discussion on this part of the three-part test.

15. 403 U.S. 672 (1971).

16. 379 F. Supp. 872 (D. Kan. 1974).

17. See Note 7, supra.

18. 403 U.S. at 676.

19. Id. at 674-676.

20. See Note 12, supra.

21. 403 U.S. at 686.

22. Id. at 686, 687

23. C. Wilson, Tilton v. Richardson, The Search for Sectarianism in Education (Washington, D.C.: Association of American Colleges, 1971), p.32.

24. This idea does not appear to be an original idea with the Chief Justice but rather seems to have its origin in the ideas of D. Giannela, late Professor of Law at Villanova University. See generally, Giannela, "Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Non-establishment Principle." 81 Harv. L. Rev. 513 (1968). The Chief Justice footnoted the Giannela article several times in his Tilton opinion.

25. Note, "Constitutionality of the Proposed Kansas Tuition Grant Program," 10 Washburn L.J. 431 (1971).

26. 379 F. Supp. 872,892 (1974).

27. Id. at 892,893.

28. Id. at 888.

29. Id. at 888-894.

30. Id. at 895.

31. 116 Cal. Rptr. 361, 526 p.2d 513 (Sup. Ct. 1974).

32. 413 U.S. 734 (1973).

33. 426 U.S. 736 (1976). See also, Recent Developments, "Constitutional Law - First Amendment - State Aid to Non-Public Sectarian Colleges", 44 Tenn. L. Rev. 377 (1977).

34. 413 U.S. at 747.

35. Id. at 754.

36. Id. at 745,746.

37. Id. at 747.

38. Id.

39. Id. at 748.

40. Id. at 747.

41. See Note 6, supra , p.111.

42. 432 F. Supp. 971 (E.D. Ark. 1977).

43. 429 F. Supp. 871 (W.D. N.C. 1977).

44. Id. at 878.

45. 433 F. Supp. 97 (M.D. Tenn. 1977), aff'd 98 S. Ct. 39 (1977).

46. 384 F. Supp. 714 (M.D. Tenn. 1974).

47. 433 F. Supp. at 105.

48. Wilson, op. cit., p.48.

49. 379 F. Supp. at 896.

50. Wilson, op. cit., p.48.